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No. 15-866

IN THE

Supreme Court of the United States

STAR ATHLETICA, L.L.C.,

Petitioner,

v.

VARSITY BRANDS, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The Copyright Act provides copyright protection to original "pictorial, graphic, and sculptural works." 17 U.S.C. § 102(a)(5). Designs of "useful article[s]" fall within this category and are eligible for copyright protection if the design "incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." *Id.* § 101. Respondents have registered copyrights for several two-dimensional graphic designs that they incorporate onto athletic apparel. The Sixth Circuit held that these designs were separable from the utilitarian aspects of the clothing on which they appear and therefore are eligible for copyright protection.

The questions presented are:

1. Did the Sixth Circuit err by holding that respondents' two-dimensional graphic designs are entitled to copyright protection as "pictorial, graphic, and sculptural works" under 17 U.S.C. § 102(a)(5)?

2. Did the Sixth Circuit commit any reversible error by holding that the Copyright Office's registration decisions merited the modest deference available under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), after concluding that the Office had applied a consistent approach to similar designs and had explained its decisions in several well-reasoned letters?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, respondents state:

Varsity Brands, Inc. (n/k/a Varsity Brands, LLC), Varsity Spirit Corporation (n/k/a Varsity Spirit LLC), and Varsity Spirit Fashion & Supplies, Inc. (n/k/a Varsity Spirit Fashion & Supplies, LLC) are indirect subsidiaries of Hercules VB Holdings, Inc. No publicly held company owns 10% or more of any of the respondents.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

Neither question presented implicates any circuit split, and there is no basis for this Court's review. Petitioner's primary circuit-split claim (concerning separability as it relates to clothing design) blurs a basic distinction in copyright law. And petitioner's second question presented (concerning *Skidmore* deference) is both splitless and inconsequential.

Respondents ("Varsity") have registered hundreds of two-dimensional graphic designs with the Copyright Office. Varsity incorporates the designs onto various items of athletic apparel. The Sixth Circuit held that five of Varsity's designs were eligible for copyright as "graphic . . . works" under 17 U.S.C. § 102(a)(5), because, as fabric designs, they are separable from the utilitarian aspects of the cheerleading uniforms on which they appear. Pet. App. 45a-50a. The Sixth Circuit's decision is unremarkable. Courts routinely hold that two-dimensional graphic designs like Varsity's are eligible for copyright protection, regardless of whether the design is used on clothing, rugs, or some other surface. *See* 1 *Nimmer on Copyright* § 2.08[H], at 2-144 (2015) ("[I]t is now clear" that "fabric designs" are "copyrightable"). Petitioner does not identify a single contrary decision.

Instead, petitioner tries to manufacture a circuit split by comparing the Sixth Circuit's decision with decisions from the Fifth and Second Circuit that involve the three-dimensional designs of *garments themselves*, often referred to as "dress designs." In contrast to "fabric designs," "dress" or garment designs describe "the shape, style, cut, and dimensions"

of a garment. 1 *Nimmer on Copyright* § 2.08[H], at 2-143. The distinction between fabric design (copyrightable) and dress design (typically not copyrightable) "has been uniformly followed by the courts." 2 *Patry on Copyright* § 3:151, at 3-457 (2015). The Sixth Circuit applied that distinction here and concluded that Varsity's graphic designs were "like fabric design[s]." Pet. App. 44a, 47a-50a. The Fifth and Second Circuits have applied this distinction as well. The two decisions that petitioner claims (Pet. 27) "conflict[] directly" with the decision below are fully explained by this basic factual difference, as the Sixth Circuit recognized in distinguishing both cases. *See* Pet. App. 49a-50a & n.3.

Resisting this conclusion, petitioner insists (Pet. 27, 29) that Varsity's designs cannot be copyrighted because the "braid[s], chevrons, and color blocks" they use supposedly are what make cheerleading uniforms real cheerleading uniforms. Petitioner's contention is flawed, as the Sixth Circuit correctly realized. *See* Pet. App. 43a-44a. But regardless, petitioner's fact-bound assertion about the essence of cheerleading uniforms does not warrant review

Petitioner also makes a more generalized claim (Pet. 21-26) that courts are divided over the test for separability under the Copyright Act, 17 U.S.C. § 101. This Court has repeatedly and recently denied petitions raising this issue,[1] and there is no cause to change course here. Contrary to petitioner's claims of circuit conflict, many of the supposedly dis-

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[1] *See Home Legend, LLC v. Mannington Mills, Inc.*, No. 15-117 (cert. denied Oct. 5, 2015); *Inhale, Inc. v. Starbuzz Tobacco, Inc.*, No. 14-396 (cert. denied Dec. 8, 2014); *Jovani Fashion, Ltd. v. Fiesta Fashions*, No. 12-863 (cert. denied Mar. 18, 2013).

tinct "tests" petitioner discusses simply recite factors that courts have considered relevant in particular cases—as demonstrated by petitioner's reliance on multiple cases from the same circuit (the Second Circuit) to support its supposed split. *See* Pet. 21-23. Nor did the Sixth Circuit somehow create a tenth test merely by "restat[ing]" and applying the Copyright Act's definitional section. Pet. 24. To the contrary, the Sixth Circuit noted that its approach, which incorporated several considerations from the various approaches, "is consistent with the holdings of . . . sibling circuits." Pet. App. 38a.

Petitioner told the Sixth Circuit that "[a] single one-size-fits-all separability test for all useful articles is neither possible nor desirable," Pet. C.A. Br. 29, and even now petitioner declines to endorse any one test, *see* Pet. 26. Even if it were possible to fashion an all-encompassing test for every kind of useful article, this case would be a poor vehicle to create one. Two-dimensional graphic designs like Varsity's can be copyrighted under any plausible standard.

The second question presented, concerning whether courts may give the responsible agency's copyright-registration decisions the modest respect available under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), also does not warrant review. This issue implicates no circuit split and did not affect the outcome below. Indeed, the Sixth Circuit discussed deference at length mainly to *reject* the higher level of deference that applies under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Finally, this petition is a poor vehicle to review either question presented because it is interlocutory. The Sixth Circuit decided only that Varsity's designs

could be protected as graphic works and "express[ed] no opinion" about petitioner's other defenses to infringement. Pet. App. 50a. If the lower courts on remand were to hold that petitioner is not liable for infringement, that would eliminate any need to consider the questions presented here.

The petition for certiorari should be denied.

STATEMENT

A. The Copyright Act Provides Copyright Protection For Graphic Designs, Including Graphic Designs That Are Separable From The Useful Articles That Incorporate Them

Authors can obtain copyright protection for several categories of works of authorship, including "pictorial, graphic, and sculptural works." 17 U.S.C. § 102(a)(5). "Pictorial, graphic, and sculptural works" are defined to include "two-dimensional and three-dimensional works of fine, graphic, and applied art." *Id.* § 101. The category also includes "works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned." *Ibid.*

In the case of "useful article[s]," designs that "incorporate[] pictorial, graphic, or sculptural features" are eligible for copyright if the features "can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." *Ibid.* "[U]seful article" is defined to mean an "article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to

convey information," and includes "[a]n article that is normally a part of a useful article." *Ibid.*

In providing copyright protection to the separable pictorial, graphic, or sculptural features of useful articles, the Copyright Act "expressly adopts" this Court's holding in *Mazer v. Stein*, 347 U.S. 201 (1954), which construed an earlier version of the statute. 1 *Nimmer on Copyright* § 2.08[B][3], at 2-90. In *Mazer*, the Court held that statuettes that were to be mass-produced and used as lamp stands enjoyed copyright protection, insofar as protection was tied to the lamp stands' "form but not their mechanical or utilitarian aspects." 347 U.S. at 217-18 (quotation marks omitted).

B. Varsity Is The Author Of Many Two-Dimensional Graphic Designs, Which Varsity Uses On Athletic Apparel

Varsity designs, manufactures, and sells high-quality apparel and accessories for use in cheerleading and other athletic activities. Pet. App. 3a. Unlike some of its competitors, Varsity devotes significant resources to employing its own designers, who create original graphic designs. Varsity then incorporates the designs onto its athletic apparel and accessories. *Id.* at 3a-4a.

Varsity's design team begins by creating two-dimensional sketches on paper. These "design concepts consist[] of 'original combinations, positionings, and arrangements of elements which include V's (chevrons), lines, curves, stripes, angles, diagonals, inverted V's, coloring, and shapes.'" Pet. App. 3a. The artistic judgment of Varsity's designers is not

constrained by functional considerations concerning how a garment eventually would be made. *Ibid.*

Graphic designs can be incorporated onto clothing in multiple ways, including by (1) cutting and sewing together panels of fabric; (2) sublimating the design by transferring ink onto fabric through a heating process; (3) embroidering the design onto the fabric; and (4) screen printing, which involves spraying ink onto the surface of the garment. Pet. App. 4a. Varsity primarily uses the "cut-and-sew" and sublimation methods. *Id.* at 4a & n.1, 60a.

Customers select from among Varsity's many "interchangeable" designs, and then customize the colors, shape, and braiding[2] for the garment on which the selected pattern will appear. *Id.* at 4a, 45a-46a. Varsity's designs can be, and have been, applied to products other than cheerleading uniforms. Pet. App. 46a. For example, Varsity has applied its designs to jackets, t-shirts, practice wear, and warm-ups. *Ibid.* In addition, Varsity's expert explained that Varsity's designs could be incorporated onto "painted canvases, tote bags, notebooks, iPhone covers, or any number of consumer goods." Varsity's Statement of Undisputed Facts ("Varsity's SUF") ¶ 40, ECF No. 173;[3] Declaration of Susan Scafidi ¶ 17 & Ex. 3, ECF No. 173-4.

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[2] Petitioner incorrectly asserts (Pet. 14) that Varsity uses braids to cover the seams in its finished garments. In fact, whether and where braids are used is determined by the artist's design. Declaration of Kimberly Williams ¶ 5, ECF No. 173-2. Moreover, braids are not used for designs that are incorporated onto garments through the sublimation process. Declaration of Gary Spencer ¶ 8, ECF No. 173-1.

[3] All ECF numbers refer to the district court docket.

C. The Copyright Office Has Registered Hundreds Of Varsity's Two-Dimensional Graphic Designs, Including The Five Designs At Issue In This Case

Varsity has registered hundreds of original graphic designs with the Copyright Office as two-dimensional artwork. Pet. App. 4a, 21a-22a. Registering these designs has involved extensive back-and-forth between the Copyright Office and Varsity.

The Copyright Office registered more than 50 of Varsity's designs (not at issue here) following an initial rejection. Varsity's SUF ¶ 35. Contrary to petitioner's assertion (Pet. 13), the initial refusals were based on questions about originality, not functionality. *See* Varsity's SUF ¶¶ 35-37; Declaration of Brian Carroll ¶ 5 & Ex. A, ECF No. 173-6. Varsity requested reconsideration, and the Copyright Office, after careful review, ultimately concluded that all of the designs—the "treatment and arrangement of the elements, coupled with their coloring"—were original and separable. Declaration of Brian Carroll Ex. A. The Office set forth its reasoning in letters issued to Varsity. *Ibid.*; Pet. App. 21a-22a.

None of Varsity's designs—including the five at issue here—was registered under the Copyright Office's "Rule of Doubt." Pursuant to that rule, the Office may register a design despite reasonable doubt that the submitted material constitutes copyrightable subject matter—depriving the copyright of a presumption of validity. *See Compendium III of Copyright Office Practices* § 607, at 600-35-600-36 (2014). When the Office relies on this rule, it adds an anno-

tation to the certificate of registration and the online public record. *Ibid.*

This case involves the infringement of five of Varsity's two-dimensional graphic designs, which were created by Varsity's in-house designers. Joint Statement of Undisputed Facts ("Joint SUF") ¶¶ 7-45, ECF No. 170. Varsity received a federal copyright registration for each of the designs. Pet. App. 4a-10a. Three of the designs were registered by the Copyright Office within five years after first publication, making them eligible for a presumption of validity under 17 U.S.C. § 410(c). Pet. App. 15a. The deposit materials, which display the registered designs, are reproduced in the Sixth Circuit's opinion. *Id.* at 5a-9a.[4]

D. Procedural History

1. Petitioner Star Athletica sells athletic uniforms and accessories. Pet. App. 10a. Shortly after its founding in 2010, petitioner began to sell cheerleading uniforms. *Ibid.* Varsity observed that petitioner's marketing materials included uniforms that depicted five of Varsity's registered designs.

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[4] Petitioner erroneously asserts (Pet. 14-15) that Varsity described the copyrighted work differently in litigation than it did before the Copyright Office. In fact, Varsity has consistently represented that its copyright was for two-dimensional graphic designs depicted in its deposit materials, not for three-dimensional garments. *See* Varsity C.A. Reply Br. 11-15. Petitioner's contention that Varsity has extended its copyright to cover three-dimensional garments—rather than the designs that appear *on* those garments—has no basis in the record. *See* Pet. 32 (citing *Jack Adelman, Inc. v. Sonners Gordon, Inc.*, 112 F. Supp. 187 (S.D.N.Y. 1934)).

Varsity filed suit against petitioner, asserting, *inter alia*, five claims for copyright infringement. Pet. App. 10a, 61a. The district court denied petitioner's motion to dismiss, and also granted Varsity's motion to dismiss petitioner's antitrust counterclaim. *See* Order (W.D. Tenn. Apr. 21, 2011), ECF No. 56; Order (W.D. Tenn. Oct. 31, 2011), ECF No. 80.[5] Following discovery, the parties cross-moved for summary judgment. Pet. App. 11a. With respect to Varsity's copyright claims, petitioner argued that Varsity's designs were not protected because the designs were for useful articles and were not separable from the utilitarian function of cheerleading uniforms. *Id.* at 11a-12a.

2. The district court granted summary judgment to petitioner on Varsity's copyright claims. Pet. App. 58a-78a. The district court based its conclusion solely on petitioner's separability argument. *Id.* at 50a.

In deciding the separability issue, the district court identified its "central" task as "think[ing] about, and com[ing] close to defining, the essence of a 'cheerleading uniform.'" Pet. App. 58a. The district court concluded that Varsity's graphic designs are not separable from cheerleading uniforms because, the court believed, the designs are intrinsic to "the core of the ideal [] of 'cheerleading-uniform-ness.'" *Id.* at 59a. The district court acknowledged Varsity's argument that a "blank cheerleading silhouette" could cover the body just as well as any other cheerleading uni-

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[5] Despite the dismissal of its counterclaim, petitioner recycles its antitrust allegations in its petition as though they were fact. *See* Pet. 13, 31; *see also* Public Knowledge Amicus Br. 8-9. Petitioner's allegations are both meritless and entirely irrelevant to the questions presented.

form. *Id.* at 74a. But the court thought this was irrelevant, because the designs supposedly were too closely associated with "the ideal of a 'cheerleading uniform'" to be copyrighted. *Id.* at 59a, 75a. In reaching this conclusion, the district court noted Varsity's contention that, under 17 U.S.C. § 410(c), Varsity was entitled to a presumption that the copyrights it registered within five years of first publication were valid, but the court concluded the presumption was "easily dispensed with" in this case. Pet. App. 64a n.2.

3. The Sixth Circuit reversed. Pet. App. 1a-53a. The court held that Varsity's designs are eligible for copyright as graphic works under 17 U.S.C. § 102(a)(5). The court remanded to the district court for further proceedings, allowing the district court to address the remaining issues of infringement, originality, and damages in the first instance. *Id.* 3, 50, 52-53.

a. The Sixth Circuit began its opinion by addressing the level of deference that should apply to the Copyright Office's determination that Varsity's designs are the subject of valid copyrights. Pet. App. 15a-22a. The court concluded that *Chevron* deference did not apply to the Copyright Office's registration decisions. *Id.* at 19a-21a. Instead, the court held that such decisions can receive only *Skidmore* deference, under which judicial deference depends on the quality and consistency of the agency's reasoning. *Id.* at 21a. In this case, the court concluded that some deference was appropriate because the Copyright Office had "consistently found," that comparable graphic designs were copyrightable, and had explained its previous registration decisions in letters

to Varsity that "use[d] sound legal reasoning" that was grounded "in the text of the statute." *Id.* at 22a.

The Sixth Circuit then turned to what the court identified as "the question that strikes at the heart of this appeal": whether "cheerleading uniforms are truly cheerleading uniforms without the stripes, chevrons, zigzags, and color blocks" used in Varsity's designs. Pet. App. 2a; *see id.* at 22a-50a. Concluding that they were, the court held that Varsity's designs were copyrightable. *Id.* at 42a-50a.

The Sixth Circuit based its conclusion on the answers to "a series of questions . . . grounded in the text of the Copyright Act." Pet. App. 37a. After determining that Varsity's designs were "works of . . . graphic . . . art" and designs of useful articles, the court turned to identifying the relevant "utilitarian function" of Varsity's garments as "cover[ing] the body, wick[ing] away moisture, and withstand[ing] the rigors of athletic movements." *Id.* at 42a-43a. The court rejected petitioner's much broader view of function—"identify[ing] the wearer as a cheerleader"—because the statute expressly excludes the mere "'convey[ing] [of] information'" from the definition of "useful article." *Id.* at 43a (quoting 17 U.S.C. § 101). Likewise, the court rejected petitioner's contention that designs that serve a "decorative function" on clothing are purely utilitarian and uncopyrightable because, *inter alia*, that argument contradicted "well-established" law recognizing that fabric designs are eligible for copyright. *Id.* at 44a. Applying its understanding of function, the court concluded that cheerleading uniforms can exist without Varsity's graphic features—indeed, record evidence "establishe[d]" that "not all cheerleading uniforms must

look alike to be cheerleading uniforms." *Id.* at 45a-46a. The court also determined that Varsity's designs could exist independently of the uniforms, because they are transferable to other surfaces including other apparel. *Id.* at 46a-47a.

Summarizing its decision, the Sixth Circuit explained that its holding was "consistent with other courts' treatment of the protectability of clothing and the pictorial and graphic features that appear on clothing." Pet. App. 47a. The court observed that courts "have drawn a line between 'fabric design' and 'dress design,'" with courts generally regarding only the former category as readily copyrightable. *Id.* at 47a-49a. Because Varsity's graphic designs "are more like fabric design than dress design," the court "h[e]ld that they are protectable subject matter under the Copyright Act." *Id.* at 50a. By contrast, the court distinguished the Second Circuit and Fifth Circuit decisions relied upon by petitioner, because those cases involved "dress designs." *Id.* at 48a-49a.

b. Judge McKeague dissented. Pet. App. 53a-57a. He would have held that "the stripes, braids, and chevrons on a cheerleading uniform" were not copyrightable because they are essential to a cheerleading uniform's "identifying function" and cannot be separated from that function. *Id.* at 54a-56a.

REASONS FOR DENYING THE WRIT

The decision below does not create or implicate any circuit conflict. Petitioner's contention that other circuits would hold that Varsity's designs cannot be copyrighted ignores a basic distinction in copyright law between fabric designs like Varsity's and the designs of garments. This factual distinction—which

the petition skips over—rather than any disagreement over how to interpret the Copyright Act, fully explains the decisions that petitioner claims are in conflict with the Sixth Circuit. Petitioner's attempt to identify a higher-level circuit split over the test for copyrighting features of useful articles also provides no basis for review, because every circuit would hold that two-dimensional graphic designs are eligible for copyright.

Petitioner's second question presented also does not warrant certiorari. Petitioner does not identify any circuit that has adopted petitioner's position that *Skidmore* deference is categorically inapplicable to copyright registration decisions, and several circuits have applied at least this level of deference to Copyright Office decisions. Moreover, there is no reason to believe the modest level of deference available under *Skidmore* affected the outcome in this case: the court of appeals spent time on deference primarily to *rule out* applying *Chevron*.

This case is also a poor vehicle because the petition is interlocutory. If petitioner on remand were to successfully defend against infringement, then there would be no reason to consider either question presented.

I. The Sixth Circuit's Conclusion That Varsity's Fabric Designs Are Separable From Garments' Utilitarian Aspects Does Not Warrant Review

The Sixth Circuit's decision does not implicate or create any circuit split on the issue of separability under the Copyright Act. Petitioner's claims to the contrary ignore the distinction between two-

dimensional surface designs (*i.e.*, fabric designs) and dress designs, and also substantially overstate any methodological disagreement in the circuits.

A. There Is No Circuit Split On The Question Whether Two-Dimensional Graphic Designs On Garments Are Copyrightable

Although petitioner claims that the circuits are "hopelessly fractured" on the issue of separability (Pet. 26), it identifies just two decisions that supposedly "conflict[] directly" (Pet. 27-29) with the decision below: a Fifth Circuit decision and an unpublished Second Circuit decision. Petitioner compares apples and oranges. The Fifth and Second Circuit decisions are not applicable here because they addressed whether dress designs (*i.e.*, design features *of* garments) not fabric designs (*i.e.*, graphic designs that may appear *on* the surface of garments) are copyrightable. The Sixth Circuit recognized this well-settled difference and expressly distinguished both the Fifth and Second Circuit decisions. *See* Pet. App. 49a & n.13.

1. In *Galiano v. Harrah's Operating Company*, the Fifth Circuit held that the design of a uniform for casino employees—and in particular the uniform's arrangement of "buttons, pleats, and collars"—could not be copyrighted. 416 F.3d 411, 414, 422 (2005). The court reasoned that these design features were not separable from the utilitarian features of the uniforms. *Id.* at 422.

The Fifth Circuit cautioned that its reasoning was applicable to "***garment design only***," which the court specifically distinguished from "fabric design." 416 F.3d at 419-20, 421. The court explained that

"[f]abric designs include patterns or artistic features imprinted onto a fabric or that appear repeatedly throughout the dress fabric," whereas garment or "dress" designs "set forth the shape, style, cut, and dimensions of converting fabric into a finished dress or other clothing garment." *Id.* at 419. The court recognized that fabric designs "are generally entitled to copyright protection" because "one can generally separate the artistic elements of th[e] design from the utility of the wearable garment." *Ibid.* By contrast, the court explained, designs of garments themselves "generally do not have artistic elements that can be separated from the utilitarian use of the garment." *Ibid.* Concluding that the plaintiff's copyright for the layout of buttons, pleats, and collars on casino uniforms was a garment design with no separable creative features, the Fifth Circuit held that designs were not copyrightable. *Id.* at 421-22.

As the Fifth Circuit itself explained, *Galiano*'s holding does not apply to the graphic designs at issue in this case. As discussed, pp. 11-12, *supra*, the Sixth Circuit recognized the same distinction between "fabric designs" and "dress designs"; the Sixth Circuit simply concluded that, in contrast to the casino uniform design in *Galiano*, "the graphic features of Varsity's cheerleading-uniform design are *more like fabric design* than dress design." Pet. App. 50a (emphasis added). The Sixth Circuit indicated that it likely would have reached the same result as the Fifth Circuit if presented with the same garment design, because "the aesthetic features of th[e] [casino] uniforms could not be identified separately from" and were not "capable of existing independently of, the utilitarian aspects of the uniform pieces." Pet. App. 49a n.13 (quotation marks omitted).

The two circuits thus agreed on the basic legal distinction between design categories, and the different outcomes simply turned on the different facts. Petitioner may disagree with the Sixth Circuit's characterization of Varsity's designs. *See* Pet. 17 (claiming, without support, that the two-dimensional graphic designs are somehow related to the "shape, contour, cut, style, and fit of cheerleading uniforms" even though they can be added onto garments through, *e.g.*, sublimation). But petitioner's fact-bound assertion does not warrant review.

2. The Second Circuit's unpublished summary order in *Jovani Fashion Limited v. Fiesta Fashions*, 500 Fed. Appx. 42 (2012), *cert. denied*, 133 S. Ct. 1596 (2013), is also distinguishable. In *Jovani*, the court addressed whether three-dimensional design features for a prom dress were copyrightable. The court held that they were not, rejecting the argument that particular decorative features—"sequins and crystals," "horizontal satin ruching at the dress waist[,] and layers of tulle on the skirt"—were separable from the dress's utilitarian function. *Id.* at 44.[6]

The *Jovani* summary order provides no reason to believe the Second Circuit would have reached a different result from the Sixth Circuit with respect to Varsity's two-dimensional graphic design. Again, the Sixth Circuit expressly *agreed* with the holding in

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[6] The plaintiff in *Jovani* "acknowledged that there is no discernible pattern of sequins" in its design and therefore "conceded that it [was] not claiming a copyright in the fabric designs of its dress." *Jovani Fashion, Ltd. v. Cinderella Divine, Inc.*, 808 F Supp. 2d 542, 551 (S.D.N.Y. 2011). As a result, the district court distinguished precedents that "concerned the pattern of an object—a fabric design—that generally *could* be copyrightable in isolation." *Ibid.*

Jovani, explaining that the "creative arrangement" of the dress features in that case "do not qualify for copyright protection" because they all serve merely "to clothe the body." Pet. App. 49a. Thus, *Jovani* was about garment design and not fabric design. The Sixth Circuit's endorsement of *Jovani's* outcome belies petitioner's claim that there is a conflict between the decisions.

In any event—and fatal to petitioner's argument—because the *Jovani* summary order lacks precedential status in the Second Circuit, it cannot provide the basis for a circuit split. *See* 2d Cir. R. 32.1.1. Published Second Circuit decisions are consistent with the Sixth Circuit's decision here.[7] For example, the Second Circuit has repeatedly recognized a distinction between fabric designs and garment designs and held that the former are copyrightable. *See, e.g.*, *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995) ("fabric designs, such as the artwork on . . . sweaters" are protectable by copyright); *Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759, 762-63 (2d Cir. 1991) (distinguishing between "fabric designs" and "dress designs" in a case involving "printed textile[]" designs for imprinting on apparel).

Moreover, the Second Circuit has rejected arguments, like petitioner's here, that would treat all "decorative" elements of clothing as functional in their own right and thus ineligible for copyright. In *Chosun International, Inc. v. Chrisha Creations Ltd.*, 413 F.3d 324 (2d Cir. 2005), the court held that the

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[7] Petitioner's amici get this backwards when they argue that *Jovani* somehow qualifies published circuit precedent. *See* Formlabs Amicus Br. 14. Non-precedential summary orders do not change circuit law, and they provide no basis for certiorari.

plaintiff stated a claim for copyright infringement of Halloween costume designs. *Id.* at 329-30. The court reasoned that the plaintiff could show that the sculpted "heads" on the costumes were separable from the costume's function as clothing. *Ibid.* In doing so, the court "express[ed] skepticism" about the defendant's contention that the costume's useful function included "masquerad[ing] as an animal character" rather than merely "cloth[ing] the wearer's body." *Id.* at 329 n.3. As the court explained, such an expansive approach to functionality was "at odds with the Copyright Act's very definition of 'useful articles,'" which specifies that "portray[ing] the appearance of something" is not a "useful" function. *Ibid.* (citing 17 U.S.C. § 101); *see also Hart v. Dan Chase Taxidermy Supply Co.*, 86 F.3d 320, 323 (2d Cir. 1996) (taxidermy mannequin was not a "useful article" because its function was merely to portray the appearance of a fish).[8]

The Sixth Circuit applied the same reasoning in this case, rejecting petitioner's contention that a pictorial, graphic, or sculptural work's "decorative" elements are inherently functional and ineligible for

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[8] Petitioner briefly alludes (Pet. 29 n.10) to the Second Circuit's statement in an earlier opinion that "decorative elements" are "intrinsic to the decorative function of clothing" and thus generally ineligible for copyright. *Whimsicality, Inc. v. Rubie's Costume Co.*, 891 F.2d 452, 455 (1989). This statement was dicta because the court went on to explain that it "need not address" separability and decided the case on a different ground. *Ibid.* The Second Circuit has not applied the dicta in a published opinion, and commentators have criticized it as "remarkable language" that is contrary to the text and purpose of the Copyright Act. Shira Perlmutter, *Conceptual Separability and Copyright in the Designs of Useful Articles*, 37 J. Copyright Soc'y U.S.A. 339, 370 (1990).

copyright. *See* Pet. App. 43a-45a. There is no split between these circuits.

3. Petitioner's claim (Pet. 30-32) that the Sixth Circuit's decision breaks new ground because it contradicts "deliberate congressional inaction" conflates different types of designs, just like petitioner's case-law analysis. Debate in Congress has focused on whether the designs of garments and other industrial items *themselves*—*e.g.*, the shape of a dress or of a television set—should receive copyright protection. *See, e.g.*, *Protection for Fashion Design: Hearings on* H.R. 5055 *Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong., 2d Sess. (2006) (statement of the U.S. Copyright Office) (summarizing congressional debate on this issue over time). The copyrightability of two-dimensional designs that appear on garments and other useful articles has been understood differently. For example, petitioner cites (Pet. 30) a House Committee Report on the 1976 Act that petitioner claims rejected the copyrightability of "garment designs." But that same Committee Report recognized that "two-dimensional . . . graphic work[s]" that are "printed on or applied to utilitarian articles such as textile fabrics, wallpaper, containers, and the like" are eligible for copyright protection. H.R. Rep. No. 94-1476, at 55 (1976). The legislative debate over garment design thus gives petitioner no support.

B. Petitioner's Argument Turns On Fact-Bound Assertions About Cheerleading Uniforms

Because graphic designs that appear on clothing or other useful articles routinely receive copyright protection, petitioner's claim that Varsity's graphic designs are different depends on factual assertions about the unique nature of cheerleading uniforms. The district court believed that defining the "the essence," or "ideal" form, of a cheerleading uniform was the "central" issue presented in the case, and the court ultimately concluded that Varsity's designs could not be copyrighted because a uniform without them would lack the requisite "cheerleading-uniform-ness." Pet. App. 58a-59a. The Sixth Circuit also believed that the true nature of cheerleading uniforms "strikes at the heart" of the case (Pet. App. 2a), but the court adopted a different understanding of the uniform's essential characteristics (Pet. App. 43a-46a).[9]

Petitioner continues to rely on this framing. Citing only the district court's opinion, petitioner claims that the "braids, chevrons, and color blocks" in Varsity's designs are not copyrightable because "these decorative elements of cheerleading uniforms are intrinsically linked to the utilitarian function of cheerleading uniforms—identifying the wearer as a cheerleader, associating the wearer with a certain team, and enhancing the wearer's attractiveness." Pet. 29;

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[9] Judge McKeague's dissent likewise relied on his aesthetic judgment that a "blank white pleated skirt and crop top" was not "appropriate attire for a member of a cheerleading squad." Pet. App. 53a.

see also Pet. C.A. Br. 32 (arguing that although "[a] sweater is still a sweater" without a particular pattern on the front, a "cheerleading uniform is not a cheerleading uniform without the constituent elements of team colors, stripes and chevrons").

The Court should reject petitioner's invitation to review the metaphysics of cheerleading uniforms. Unsurprisingly, there is no circuit split on the question whether a cheerleading uniform without "braids, chevrons, and color blocks" is *really* a cheerleading uniform. And deciding a case that turns on fact-bound assertions about the "essence" of cheerleading uniforms would offer little guidance to lower courts about general copyright principles.

The Sixth Circuit got this narrow question right in any event. As the Sixth Circuit explained, it is perfectly possible to conceptualize a cheerleading uniform that exists without Varsity's graphic designs. Citing photos in the record, the Sixth Circuit noted numerous examples of "plain white" cheerleading tops and skirts that are "easily identified as cheerleading uniforms"—and serve the same functions by allowing "the wearer to cheer, jump, kick, and flip"—yet lack the "stripes, chevrons, zigzags, or color-blocking" featured in Varsity's designs. Pet. App. 45a.

Moreover, the Sixth Circuit also correctly held that Varsity's graphic designs can exist independently of cheerleading uniforms. Pet. App. 46a-47a. As the court recognized, Varsity's designs have been "incorporated onto the surface of a number of different types of garments," including not only cheerleading uniforms but also "practice wear, t-shirts, warm-ups, and jackets." *Id.* at 46a. Indeed, the Varsity designs

could be "print[ed] or paint[ed]" and displayed "on the wall as art." *Id.* at 47a. The designs accordingly satisfy the statutory criteria for copyright protection, because they can "be identified separately from, and are capable of existing independently of, the utilitarian aspects of" cheerleading uniforms and other clothing. 17 U.S.C. § 101.

Petitioner's insistence (Pet. 29) that Varsity's graphic designs are inseparable from cheerleading uniforms because they "identify[] the wearer as a cheerleader," is contrary to the statutory text. The Copyright Act specifies that the "utilitarian function" of a useful article does *not* include design features that merely "portray the appearance of the article or . . . convey information." 17 U.S.C. § 101. *See* Pet. App. 43a; *Chosun*, 413 F.3d at 329 n.3. Yet according to petitioner, the mere fact that Varsity's designs are associated with cheerleading—and thus may help to identify a wearer as a cheerleader—means the designs are inseparable from the useful elements of cheerleading uniforms. The plain language of the statute precludes this argument.

C. The Purported Circuit Division Over The Separability "Test" Is Overstated And Is Not Implicated By The Facts Of This Case

Petitioner abstracts away from the supposed conflict over garments to argue more generally (Pet. 19-26) that there is a "multi-circuit conflict" over the test for separability under 17 U.S.C. § 101. But there is no direct split on this issue, and a case involving a two-dimensional graphic design is a poor vehicle to provide guidance to help lower courts resolve more

difficult cases involving the designs of three-dimensional objects.

1. Petitioner asserts (Pet. 20) that there were "at least nine different separability tests" before this case, and that the Sixth Circuit brought forth a tenth test. But most of the supposed tests on petitioner's list do not actually belong to different circuits. To begin with, only six of the ten tests are "judicial tests" at all. Pet. 23.[10] And of those six, two come from dissenting opinions, while another three are ascribed, in whole or in part, to the Second Circuit. *See* Pet. 21-22.

In addition, the cited decisions regard the various "tests" and verbal formulations as complementary, rather than competing. For example, in *Pivot Point International, Inc. v. Charlene Products, Inc.*, 372 F.3d 913 (2004), the Seventh Circuit surveyed decisions on the issue of copyright in the creative features of useful articles before articulating its "design-process" approach, which the court believed "reconcile[d] the earlier case law." *Id.* at 930. In other words, what petitioner identifies as a fifth test was intended by the Seventh Circuit to build upon what petitioner labels tests two, three, and four. *See id.* at 924-32; *see also Brandir Int'l v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987) (stating that its focus on design process is "consistent with the holdings" of earlier cases, including *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980), and *Carol Barnhart Inc. v. Economy Cover Corp.*, 773 F.2d 411 (2d Cir. 1985)). Other circuits

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[10] If "academic approaches that have not been adopted by any federal appellate courts" (Pet. 23) justified certiorari review, this Court's workload would be unmanageable.

have likewise "[s]ynthesiz[ed]" case law on separability from other circuits without suggesting the decisions apply conflicting tests. *Universal Furniture Int'l, Inc. v. Collezione Europa USA, Inc.*, 618 F.3d 417, 434 (4th Cir. 2010) (per curiam).

2. The Sixth Circuit used a similarly inclusive approach here. Contrary to petitioner's assertion (Pet. 17, 23) the Sixth Circuit did not "reject[]" all preexisting tests. Instead, the court noted that other circuits "have used multiple . . . approaches in the same case when analyzing whether the 'pictorial, graphic, or sculptural features'" are separable from the utilitarian aspects of a useful article. Pet. App. 33a (quoting 17 U.S.C. § 101). And noting that "it is difficult to select one approach" for all fact-patterns, the Sixth Circuit followed these circuits in applying a "similar hybrid approach." *Id.* at 37a. Thus, the Sixth Circuit expressly built several existing "tests" into its analysis. *See id.* at 40a (embracing aspects of the "objectively necessary approach" and the "design-process approach," as well as the Copyright Office's "side by side" approach).

Petitioner previously endorsed such an ecumenical approach to separability, explaining that "[a] single one-size-fits-all separability test . is neither possible nor desirable." Pet. C.A. Br. 29. Even now, petitioner finds "much to commend" in a combination of several tests, and never specifies just what it thinks the right test would be (or why it would prevail). Pet. 26. Thus, aside from petitioner's odd criticism of the Sixth Circuit for hewing too closely to the Copyright Act's definitions (Pet. 24), it is not clear what disagreement petitioner has with the Sixth Circuit's methodology. Instead, petitioner simply disagrees

with how the court applied the text of the statute to the facts of this case.

To be sure, the Sixth Circuit declined to apply the "likelihood-of-marketability" test that the Fifth Circuit used in *Galiano*. Pet. App. 41a.[11] But the Sixth Circuit's rejection of this much-criticized approach[12] does not conflict with Fifth Circuit precedent because, as discussed above, pp. 14-15, *supra*, the *Galiano* court limited application of the test to "*garment design only*"—a category the court expressly distinguished from "fabric design." 416 F.3d at 419-22.[13] Because the Sixth Circuit understood that Varsity's copyright is for a type of fabric design (Pet. App. 50a), there is no conflict.

3. This case is a poor vehicle for the Court to provide any general guidance on the test for separability. Two-dimensional graphic designs like Varsi-

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[11] The Sixth Circuit also indicated that it did not "endorse looking at why the designer chose the ultimate design as the final expression of the result she was trying to achieve to the exclusion of other evidence." Pet. App. 40a-41a. Neither the Seventh Circuit in *Pivot Point* nor any other circuit applying the "design-process" approach has held that the designer's motivation is the *only* evidence courts may consider. There is accordingly no conflict.

[12] *See, e.g.*, 2 *Patry on Copyright* § 3:143, at 3-423 (describing the likelihood-of-marketability approach as "discredited" and "the worst possible solution" to determining separability).

[13] Petitioner briefly references (Pet. 28) the Ninth Circuit's decision in *Poe v. Missing Persons*, 745 F.2d 1238 (1984). Like *Galiano*, *Poe* addressed the design of a garment (a swimsuit) rather than a pattern design. *See id.* at 1239. Moreover, the court did not establish a test for separability, as subsequent Ninth Circuit case law makes clear. *See Inhale, Inc. v. Starbuzz Tobacco, Inc.*, 755 F.3d 1038, 1040-41 (9th Cir.), *cert. denied*, 135 S. Ct. 758 (2014).

ty's do not raise any of the line-drawing difficulties that sometimes exist in cases involving three-dimensional designs; indeed, under the statutory text, separability analysis should not even apply to Varsity's graphic designs.

The Sixth Circuit's decision proceeded from the assumption that the copyrightability of Varsity's graphic designs turned on separability analysis. Pet. App. 42a. But in order for this Court to provide any guidance to lower courts on separability, the Court would first have to determine that Varsity's designs are "of a useful article" under 17 U.S.C. § 101. In fact, two-dimensional graphic designs like Varsity's are not *themselves* "design[s] of [a] useful article"; rather, they can be "applied to" useful articles such as clothing, rugs, or other objects. 2 *Patry on Copyright* § 3:150, at 3-453-3-454. "Accordingly, use of the separability test is inappropriate." *Ibid.*

Even assuming separability analysis is relevant, this petition does not provide an opportunity for the Court to "clarif[y] . . . the law of separability." Pet. 41. The hard separability cases—and most of the cases that petitioner cites—involve designs of three-dimensional objects that have both functional and decorative features. *See, e.g.*, *Universal Furniture*, 618 F.3d at 424-25 (furniture collections); *Pivot Point*, 372 F.3d at 915-16 (human mannequin head); *Brandir*, 834 F.2d at 1143 (bicycle rack); *Carol Barnhart*, 773 F.2d at 412 (human mannequin); *Kieselstein-Cord*, 632 F.2d at 990-91 (belt buckle). Confirming the point, petitioner's amici specifically seek guidance about the copyrightability of "3D" "mixed-use objects" that can be reproduced with 3D printing. Formlabs Amicus Br. 9-11.

By contrast, courts and commentators have recognized that "it is relatively easy to obtain copyright protection for designs of useful articles appearing in two-dimensional rather than three-dimensional form." 1 *Goldstein on Copyright* § 2.5.3, at 2:83 (3d. ed. 2005); *see also Home Legend, LLC v. Mannington Mills, Inc.*, 784 F.3d 1404, 1413 (11th Cir.), *cert. denied*, 136 S. Ct. 232 (2015) (explaining that it is "obviously true" that "any two-dimensional image" is conceptually separable from the object on which it is appears). Moreover, as discussed at length above, pp. 1-2, 12-17, *supra*, it is well established in the clothing industry that fabric designs are eligible for copyright while dress designs typically are not. *See, e.g., Knitwaves, Inc.*, 71 F.3d at 1002 (graphic designs on sweaters are copyrightable); *see generally* 1 *Nimmer on Copyright* § 2.08[H], at 2-143 to 2-149.

Varsity registered its copyrights in two-dimensional designs that the Sixth Circuit properly characterized as being "like fabric design[s]." Pet. App. 4a, 50a. The designs would be copyright-eligible as graphic works in any circuit and under any plausible test for separability (assuming separability doctrine applies). Reviewing this fact-pattern would not provide lower courts with the guidance that petitioner claims they need to resolve other, harder cases.

II. The Sixth Circuit's Decision That The Copyright Office's Registration Decisions Should Receive Skidmore Deference Does Not Warrant Review

The Sixth Circuit determined that the Copyright Office's decisions to register Varsity's numerous

graphic designs should receive a measure of deference under *Skidmore*. That conclusion does not warrant review. Petitioner has not identified any circuit conflict, and there is no basis to conclude that application of this minimal level of deference determined the outcome below.

1. The Sixth Circuit did not create any circuit conflict by applying *Skidmore* deference (but no more) to the Copyright Office's set of decisions registering Varsity's designs. To the contrary, the circuits agree on the relevant principles, and *no* circuit has adopted petitioner's position denying any deference. Thus, contrary to petitioner's claim, the Sixth Circuit's application of *Skidmore* deference was hardly "unprecedented." Pet. 34.

As the Sixth Circuit noted (Pet. App. 17a-19a), several courts of appeals have recognized that the Copyright Office's interpretations of the Copyright Act should, at a minimum, receive *Skidmore* deference. *See, e.g.*, *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 286 n.5 (3d Cir. 2004) (en banc) (Alito, J.) (deferring to the Office's "longstanding practice" not to register short phrases, and explaining that "[a]t a minimum, the practice of the Copyright Office reflects a body of experience and informed judgment to which courts . . may properly resort for guidance"). Particularly relevant here, courts have deferred to the Copyright Office's position on separability for the designs of useful articles, *e.g.*, *Inhale, Inc. v. Starbuzz*, 755 F.3d 1038, 1042 (9th Cir.), *cert. denied*, 135 S. Ct. 758 (2014), including to individual registration decisions concerning where to draw the line between "copyrightable works of art and noncopyrightable in-

dustrial designs," *Norris Indus., Inc. v. Int'l Tel & Tel. Corp.*, 696 F.2d 918, 922 (11th Cir. 1983).

Petitioner asserts (Pet. 35-36) that each of the circuit decisions applying *Skidmore* deference is somehow distinguishable, but that is hardly an argument for certiorari. Petitioner does not identify *any* decision in which courts have refused to apply *Skidmore* deference to copyright registrations. The closest petitioner comes is its reference to a three-decades-old Second Circuit opinion, *Carol Barnhart*. But the Second Circuit's decision did not even mention *Skidmore* deference, much less reject the doctrine's application—which is unsurprising given the state of agency-deference law in 1985. Rather, the Second Circuit merely indicated that it was "*permissible* for the district court itself to consider how the copyright law applies to the articles under consideration," and to reject the "'mute testimony'" of the Copyright Office's registration approval. 773 F.2d at 414 (emphasis added). The court's holding and reasoning are consistent with the premises behind *Skidmore* deference, because the doctrine provides that agency interpretations are "entitled to respect" only "in proportion to their power to persuade." *Wos v. E.M.A. ex rel. Johnson*, 133 S. Ct. 1391, 1402 (2013) (quotation marks omitted). An isolated and "mute" registration decision may lack significant persuasive value.

In contrast to *Carol Barnhart*, the Copyright Office was not "mute" here. As the Sixth Circuit recounted, the Office discussed the basis for approving similar Varsity graphic designs for registration in several letters, in which the Office "grounded its decisions to register Varsity's designs in the text of the statute using sound legal reasoning." Pet. App. 22a. The

Copyright Office registered a number of these designs only after reconsidering prior denial decisions that were challenged by Varsity. Pet. 13-14. Given this context and the evidence of the Copyright Office's careful deliberation, the Sixth Circuit reasonably concluded that the registration decisions had some persuasive value. Even on the dubious assumption that the Second Circuit would today treat *Carol Barnhart* as a precedent requiring no *Skidmore* deference to a single "mute" agency decision, that position is entirely consistent with the Sixth Circuit's decision. The flexible *Skidmore* framework properly takes account of different evidence of agency deliberation and consistency. When that evidence differs, the outcome may as well.[14]

As for petitioner's attempt to distinguish the numerous other circuit decisions applying *Skidmore* deference, the lines petitioner draws do not withstand scrutiny. For example, petitioner acknowledges that courts have deferred "to the Copyright Office's decision to *deny* a registration," Pet. 35 (emphasis added), yet petitioner claims that decisions to *approve* a registration are categorically ineligible for deference. Petitioner does not identify any precedent

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[14] Petitioner points (Pet. 37) to the Copyright Office's policy of erring on the side of registration in borderline cases. But as noted, the Copyright Office did not register Varsity's designs pursuant to this "Rule of Doubt" policy. *See* pp.7-8, *supra*. In any event, such a policy does not suggest that *Skidmore* deference is *categorically* inapplicable to registration decisions. To the extent petitioner argues that Varsity's reference to this doctrine in one of its reconsideration letters to the Copyright Office *concerning designs not at issue in this case* makes deference inappropriate here, its fact-bound assertion does not warrant review.

from any court that supports (much less requires) making deference a one-way ratchet by giving weight to an agency's expertise when it says "no" but disregarding the same agency's reasoning when it says "yes." Petitioner also contends that most (though not all) of the out-of-circuit decisions relied on by the Sixth Circuit involved deference to the Copyright Office as a whole, not to the decision of "a single registration specialist." *Ibid.* That is not a basis for distinction, however, because the Sixth Circuit likewise looked beyond the registration decisions at issue, explaining that "the record suggests that the Copyright Office consistently applied the same interpretation of separability to Varsity's numerous designs like the ones at issue in this case." Pet. App. 21a.

2. Unable to identify a circuit split, petitioner argues the merits and contends (Pet. 34) that the Sixth Circuit's decision to apply *Skidmore* deference is inconsistent with the burden-shifting framework established by 17 U.S.C. § 410(c). Section 410(c) provides that proof of registration before or within five years of the first publication of a work "shall constitute prima facie evidence of the validity of the copyright." *Ibid.* Petitioner asserts that the shift in the burden of proof accomplished by this provision already provides deference to the Copyright Office's registration decision, and petitioner argues that the statute therefore must implicitly bar courts from granting any additional deference to registration decisions under *Skidmore*.

Petitioner's contention is not only splitless, but also meritless. As an initial matter, it is not clear how and whether section 410(c)'s burden allocation even applies to questions of statutory interpretation that

are the subject of *Skidmore* deference. *Cf. Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2253 (2011) (Breyer, J., concurring) (indicating that the "clear and convincing" evidentiary standard applicable to patent validity controls only the *factual*—not the legal—aspects of validity disputes in patent infringement cases). But even assuming section 410(c)'s burden-shifting framework is relevant to questions of legal interpretation, nothing in the statute suggests that courts must give equal weight to unexplained registrations and registrations that are supported by well-reasoned written explanations from the Copyright Office. *See Masquerade Novelty, Inc. v. Unique Indus., Inc.*, 912 F.2d 663, 669 n.7 (3d Cir. 1990) (stating that deference under section 410(c) is limited to burden-shifting "[*a*]*bsent an indication from the Copyright Office as to why it registered* [*the design*], or the existence of a controlling administrative regulation or interpretation" (emphasis added)). When, as here, the court concludes the Office's decision is well explained and persuasive, Pet. App. 22a, it is consistent with section 410(c) and with basic administrative-law principles for the court to grant at least the minimal level of deference that the *Skidmore* doctrine recognizes.

Petitioner's contrary approach would produce odd results. Petitioner would rule out *Skidmore* deference to any registration statements that satisfy section 410(c)'s criteria to constitute prima facie evidence of validity, but its theory would allow for deference to similar registrations from *other* cases because they are not specifically addressed by the statute. Petitioner provides no reason to believe that Congress intended to bar deference to copyright registrations in the cases they are challenged, even

though courts may rely on the persuasive value of the very same registrations in separate litigation.

Underscoring the weakness of its position, petitioner strays well beyond the question presented about *whether Skidmore* deference applies and devotes several paragraphs to criticizing *how* the Sixth Circuit understood the Copyright Office's policy in this case. *See* Pet. 37-38 (accusing the majority of "selective deference"). The fact-bound question whether the Sixth Circuit correctly applied *Skidmore* deference in this case does not merit review.

Petitioner's survey of Copyright Office policy is also flawed. Once again, petitioner conflates policies concerning garment designs with the two-dimensional graphic designs at issue here. As the very sources petitioner references make clear, the Copyright Office views the latter category of designs as copyrightable. *See, e.g.*, Registrability of Costume Designs, 56 Fed. Reg. 56,530-32 (Nov. 5, 1991) (describing a "general policy of nonregistrability of *garment designs*," while explaining that "[a] two-dimensional design applied to the surface of . clothing may be registered" (emphasis added)). In fact, the Copyright Office has expressly stated that "[a]lthough the copyright law does not protect the shape or design of clothing, . . . designs imprinted in or on fabric are considered conceptually separable from the utilitarian aspects of garments." *Compendium III of Copyright Office Practices* § 924.3(A)(1), at 900-42. Petitioner's suggestion that the Sixth Circuit misunderstood Copyright Office policy is baseless.[15]

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[15] Contrary to petitioner's claim (Pet. 37), the Sixth Circuit's inquiry into whether an observer could imagine a cheerleading

3. Review of this question is also not warranted because it was not outcome-determinative here. The panel majority did not invoke *Skidmore* deference in its discussion of separability or give any indication that it was placing a thumb on the scale in favor of copyrightability based on the registration decision. Instead, the court thoroughly examined the statutory text, legislative history, case law, and academic commentary to decide whether Varity's two-dimensional graphic designs were copyrightable. *See* Pet. App. 22a-50a. If administrative deference were doing real work in the court's analysis, the Sixth Circuit could have written a much shorter opinion on the merits. The Sixth Circuit's discussion of deference served largely to *reject* the application of greater deference, such as that available under *Chevron*. *Id.* at 16a-21a.

The low stakes involved in this issue are confirmed by the dissent, which *accepted* the majority's application of *Skidmore* deference. *See* Pet. App. 56a. The fact that judges on the panel agreed about this issue yet divided on the merits strongly suggests that the *Skidmore* label did not affect the outcome.

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uniform without the registered graphic designs (Pet. App. 45a-46a) is consistent with the Copyright Office's policy. *See Compendium III of Copyright Office Practices* § 924.2(B), at 900-40 (explaining that the separability inquiry asks, *inter alia*, whether an artistic feature could be "imagined separately and independently from the useful article without destroying the basic shape of that article").

III. The Interlocutory Petition Is A Poor Vehicle For Review

The interlocutory posture of this case makes the petition a poor vehicle to review either question presented. The Court generally reviews final judgments, rather than interlocutory decisions. *See* S. Shapiro et al., SUPREME COURT PRACTICE 250 (10th ed. 2013); *see also Mt. Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (statement of Alito, J., respecting denial of certiorari) (certiorari was properly denied "[b]ecause no final judgment has been rendered"); *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."). By doing so, the Court ensures that the record is adequately developed and conserves judicial resources by limiting review to issues that are potentially outcome-determinative in the litigation.

In this case, the lower courts have not yet resolved whether petitioner infringed Varsity's copyrights. In particular, petitioner has argued that Varsity's infringement claims has relied on design elements that are not original. Pet. App. 12a. This argument is an independent defense to infringement, and while Varsity has explained to the lower courts why petitioner's argument lacks merit, petitioner can and evidently will pursue it on remand. *See* Pet. App. 50a. If the lower courts ultimately were to accept petitioner's argument or conclude that petitioner was not liable for infringement for some other reason, there would be no need for this Court to decide the questions presented here.

* * * * *

The Sixth Circuit reached two unremarkable conclusions in this case: that Varsity's two-dimensional graphic designs are eligible for copyright because they are "like fabric design[s]" (Pet. App. 50a), that are easily separable from cheerleading uniforms and other clothing; and that the Copyright Office's consistent, and well-reasoned registration decisions were entitled to some deference under *Skidmore*, but not *Chevron* deference. Neither holding creates a circuit split. And neither issue warrants this Court's review, particularly before final judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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